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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition of the Alliance for Public Technology
Requesting Issuance of Notice of Inquiry and
Notice of Proposed Rulemaking to Implement
Section 706 of the 1996 Telecommunications
Act

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RM No. 9244

REPLY COMMENTS OF AT&T CORP.

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May 4, 1998

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Reply Comments of AT&T Corp.

May 4, 1998

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SUMMARY

Alliance for Public Technology's ("APT") petition seeks a notice of inquiry or notice of proposed rulemaking under Section 706 to consider a set of proposals that are ostensibly designed to encourage deployment of facilities for advanced telecommunications services. The Comments confirm, however, that the Commission should reject APT's specific proposals, and the Commission's Section 706 inquiry should not be limited to the one-sided set of issues that APT raises. APT's Petition is based on a false premise: that the availability of unbundled network elements ("UNEs") at forward-looking cost is deterring facilities-based entry into the market for broadband services. To the contrary, UNE-based entry is necessary both to enable facilities-based entry to occur and to spur the incumbent LECs into deploying their own broadband facilities. Forward-looking UNE rates are fully compensatory and do not deter cost-justified facilities deployment either by the incumbent LECs or by the competitive LECs.

Moreover, the Comments show that APT's specific proposals are misguided. For example, the Commission could forbear from Section 251(c) pursuant only to Section 10, and the mandatory prerequisites for Section 10 forbearance have not been met. Similarly, the Commission has no authority to declare future investment in ADSL facilities to be "proprietary" pursuant to Section 251(d)(2), as APT now suggests in its Comments, because such facilities will be subject to international standards of openness and interoperability that clearly will not be proprietary to any LEC. The Comments also confirm that APT's remarkable suggestion that the Commission should formally propose sunseting Section 251(c) at an undefined date certain would be wholly unjustified and could only encourage further obstructionism and footdragging by incumbent LECs in implementing their statutory obligations. Finally, the commenters overwhelmingly oppose APT's proposal for a new FCC program to encourage community-driven demand aggregation, because it would largely duplicate the Commission's efforts to implement Section 254 (concerning universal service).

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Public Notice released on March 12, 1998, AT&T Corp. ("AT&T") hereby respectfully submits these Reply Comments in opposition to the Petition of the Alliance for Public Technology ("APT"), which seeks regulatory and other relief under Section 706 of the Act on behalf of incumbent local exchange carriers ("ILECs"), ostensibly to encourage their deployment of advanced telecommunications capabilities.¹

The Comments abundantly confirm that APT's policy proposals are unsound and that the Commission's Section 706 inquiry should not be limited to the one-sided set of issues raised in APT's Petition. First, as the commenters show, APT's Petition is based on the erroneous assumption that the Commission's policies implementing Section 251(c), specifically unbundled access to network elements ("UNEs") priced at Total Element Long Run Incremental Cost ("TELRIC"), are discouraging facilities-based entry into the market for broadband data services. Rather than abandoning those policies, as APT urges, the Comments demonstrate that, if anything, the Commission should redouble its efforts to

¹ A list of Commenters appears as Appendix A.

enforce those policies, to ensure that competitive entry will spur the investment and innovation that APT seeks.

Second, the Comments also show that the Commission should reject APT's specific proposals. In particular, the Commission has no authority to limit the applicability of Section 251(c) to the ILECs' networks as they existed on August 8, 1996, either under Section 706 (as APT originally proposed) or under Section 251(d)(2) (as APT now proposes in its Comments). Nor is there any basis at present for the Commission to hold out the possibility of sunseting Section 251(c) pursuant to Section 10 on any date certain. Finally, virtually all commenters disagree with APT's proposals for a new Commission program to encourage community-driven demand aggregation, in light of the Commission's extensive universal service mechanisms.

I. THE COMMENTS CONFIRM THAT THE POLICY OF REQUIRING UNBUNDLED ACCESS TO THE ILECS' NETWORKS AT TELRIC PRICES DOES NOT DISCOURAGE FACILITIES-BASED ENTRY.

The Comments confirm that the basic premise of APT's Petition -- that the Commission's policies implementing the local competition provisions of the Act are discouraging facilities-based entry -- is incorrect. To the contrary, the Commission's policies are necessary if there is to be the widespread competitive entry and facilities-based competition that APT desires. Therefore, the Commission should not abandon those policies, as APT suggests; it should vigorously enforce them.

First, the commenters recognize, as has both Congress and the Commission,² that access to unbundled elements at forward-looking prices is necessary as a bridge to facilities-based competition. As MCI notes, "[n]o competitor wants to be in a position

² See § 251(c); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 679 (1996).

where it needs to lease essential network facilities from another competitor," and therefore most CLECs want to build their own facilities where it is economically feasible to do so. MCI at 12; *see also* Sprint at 3 ("any carrier wishing to become a nationwide, full-range player in the market will want to have its own facilities"); WorldCom at 14. CLECs cannot duplicate the LEC network overnight, however, and therefore Congress provided a means of entry, UNEs, that would allow CLECs to gain a base of customers that would justify future expansion of their own facilities. *See* MCI at 9; Sprint at 3; CIX at 7; TRA at 4-5. Thus, access to unbundled elements at TELRIC rates does not thwart facilities-based entry; it is what makes facilities-based entry possible.

Second, the TELRIC methodology itself does not result in UNE prices that deter facilities-based entry. Contrary to APT's assumption, TELRIC is not a "discounted" rate but one that fully compensates the ILEC. *See, e.g.,* MCI at 9-10 ("MCI is willing to pay cost-based rates that include a reasonable risk-adjusted profit"); Sprint at 4 ("under the Commission's pricing standards for UNEs, the RBOCs recover all of their costs, and make a handsome profit as well"); ALTS at 9-10; WorldCom at 15 ("[i]n most industries, paying customers are not considered a burden"). And because TELRIC pricing is the "economically sound" method, it induces precisely the amount of facilities-based entry that is efficient. Setting UNE rates above TELRIC would serve only to induce inefficient, and therefore unsustainable, facilities-based entry.³ Moreover, where facilities-based entry is not feasible, access to UNEs at TELRIC is necessary if consumers are to receive the full benefits of competition promised by the Act.

³ *See* Sprint at 3 ("If no party can build local facilities at a cost less than the ILECs' TELRIC, then encouraging facilities-based competition by setting rates for UNEs at a higher level would do nothing to further competition. Any CLEC that entered the market by building facilities that are more costly than the forward-looking costs of the ILECs would not be able to survive ILEC competition in the long run."); *see also* AT&T at 7.

These principles, of course, are well-settled, and the Commission has always made clear that they apply to all aspects of local entry, whether the technologies be "broadband" or not. *See, e.g., Local Competition Order*, ¶¶ 380 (requiring ILECs to provide access to loops conditioned to provide broadband services). Indeed, APT's ILEC supporters candidly admit that the basis for their support has nothing to do with broadband services per se; rather, they simply oppose the TELRIC methodology altogether. *See* BellSouth at i; GTE at 4; SBC at 6; USTA at 6-7; U S WEST at 3; Ameritech at 6. The Commission rejected all of the ILECs' arguments two years ago in the *Local Competition Order*, and there is no reason to revisit those determinations now.

Indeed, if anything, the commenters make clear that CLEC entry, including entry through UNEs, is necessary to spur the ILECs to invest in new technologies. A number of commenters in addition to AT&T have demonstrated that the ILECs have a remarkably poor track record of bringing advanced services to market in the absence of competitive forces. Many commenters note that the ILECs have been incredibly slow to upgrade their networks to offer ISDN services, even though that technology has been in existence for many years, and for most of those years the ILECs were not under any duty to unbundle network elements at all. *See, e.g.,* MCI at 6-7 & n.5; WorldCom at 15 & n.32; TRA at 7-8. Ironically, APT's criticisms of TELRIC are particularly inappropriate with regard to future investment, because TELRIC, by definition, includes all costs an efficient firm would invest. TELRIC should no more discourage ILECs from cost-justified future investments than competitive market prices discourage cost-justified investment in those markets.

Thus, APT has things exactly backwards, because it views competition as the problem rather than as the solution. Indeed, both APT and its supporters are remarkably frank in arguing that "market power" is a necessary prerequisite to investment in advanced facilities. APT Petition at 29 n.34; *see also* BellSouth at 11 (advocating window of opportunity to recover costs while no competition); WorldCom at 16 (noting that APT

openly questions the efficacy of competition). The promotion of such market power, however, is directly contrary to the terms of the Act and the policies that underlie it. Indeed, the policy of the Act is quite clear: Competition is the way to bring innovation to consumers; regulation is needed while these markets remain monopolies; forbearance from those regulations can be appropriate only after the regulatory mechanisms have been "fully implemented" (§ 10(d)) and have produced a competitive market. Thus, the entire premise of APT's Petition -- that deregulating monopolies will bring about innovation -- flies in the face of the Act. Rather than abandoning Section 251(c)'s competitive safeguards, the Commission should vigorously enforce them in order to spur the investment APT seeks. CIX at 2, 6 (competitive safeguards of the Act work together with Section 706, not against it); MCI at 2-3; TRA at 7; TCG at 5-6.

II. THE COMMENTS ALSO CONFIRM THAT APT'S SPECIFIC PROPOSALS ARE CONTRARY TO THE ACT AND BAD PUBLIC POLICY.

The Comments also demonstrate that APT's specific proposals should be rejected. AT&T will address only three of those proposals in these Reply Comments: APT's proposals to forbear from applying Section 251(c) to future investment in broadband facilities, to sunset Section 251(c) completely at an undefined future date, and to establish a new FCC program to encourage community-driven aggregation of demand for advanced services.

1. APT's suggestion that the Commission should "forbear" under Section 706 from enforcing Section 251(c) as it relates to facilities deployed after August 8, 1996, must be rejected.⁴ See APT Petition at 17-19. As AT&T and other commenters have

⁴ As AT&T explained in its Comments (at 5-6), APT's entire request is largely misdirected. Congress itself mandated unbundled access to network elements, including combinations, and mandated that such UNEs should be made available at forward-looking prices. Although APT assumes for purposes of its Petition that the

(footnote continued on following page)

conclusively shown, both here and in their comments regarding the RBOCs' related petitions for forbearance, Section 706 is not a separate grant of authority for regulatory forbearance independent of Section 10.⁵ Moreover, Section 10 itself makes quite clear that the Commission cannot forbear from Section 251(c) until that section has been "fully implemented." Neither APT nor anyone else has even attempted to show that Section 251(c) has been "fully implemented," nor could they. Section 251(c)(3)'s implementation was blocked from the outset by the ILECs' court challenges, and even now they vow to continue to "litigate these issues to the end." BellSouth at 4; *see* APT Petition at 10 (acknowledging that implementation of Section 251 has been hindered by numerous court challenges).⁶

Even APT and its supporters seem to realize that their legal argument based on Section 706 is meritless. Therefore, APT, commenting on its own Petition, now offers a

(footnote continued from previous page)

FCC's *Local Competition Order* will be upheld, it is nonetheless true that the state commissions have largely adopted the Commission's TELRIC methodology in spite of the Eighth Circuit's decision in the *Iowa Utilities Board* case. Therefore, APT is ultimately asking the Commission to undo a set of decisions made principally by Congress and the states.

⁵ *See* AT&T at 9-12; *In the Matter of Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11, Comments of AT&T, pp. 4-12 (filed April 6, 1998). *See also* Sprint at 4; MCI at 7-8; WorldCom at 9-12; ITAA at 2; ALTS at 7-8; TCG at 4-5; Intermedia at 13.

⁶ To the extent that APT's supporters are relying on Section 706, they are plainly wrong in suggesting that the Commission should first act on the pending forbearance petitions and open the Section 706 inquiry afterwards. The forbearance petitions are predicated on the notion that advanced telecommunications capabilities are not being deployed in a reasonable and timely fashion to all Americans, and that the Commission could take certain actions to speed up such deployment. That is precisely the inquiry that is mandated in Section 706 itself, however, and that inquiry clearly should precede, not follow, Commission action.

new legal theory for "forbearing" from Section 251(c). *See* APT at 2-3. APT argues that the Commission should classify future investment in such services as "proprietary" pursuant to Section 251(d)(2), and declare that providing unbundled access to these "proprietary" elements is not "necessary" and would not "impair the ability of the CLECs to provide the services that [they] seek to offer."⁷

Unfortunately, APT's new argument is no better than its old one. The electronics associated with ADSL services, to take the example held up in APT's and the RBOCs' Comments, are not "proprietary." Indeed, the RBOCs have announced that their ADSL services will be based on "an open, interoperable International Telecommunications Union (ITU) standard."⁸ This open and interoperable technology is being developed jointly by Microsoft, Intel, Compaq, Ameritech, Bell Atlantic, BellSouth, GTE, SBC, Sprint, and U S WEST, with "support" from innumerable other companies.⁹ The entire purpose of this effort is to develop universal standards such that any LEC -- whether it be an ILEC or a CLEC -- could obtain and deploy the necessary facilities and provide compatible services. Under such an arrangement, there is nothing proprietary to the ILEC, and it is simply absurd to suggest that such an open and interoperable technology suddenly becomes "proprietary" when CLECs seek unbundled access to it.

Even if these elements could be regarded as proprietary, the Commission has already recognized that access to such elements may nonetheless be "necessary" to spark competitive entry into the local market. *Local Competition Order*, ¶ 282. Indeed, as the

⁷ *See* § 251(d)(2)(A) & (B); APT at 2-3.

⁸ *See* Universal ADSL Working Group home page, "PC, Telecom, and Networking Industry Leaders Unite to Deliver Ultra-Fast Internet Access to the Home," January 26, 1998, "www.uawg.org."

⁹ *See id.* (such "supporting" companies include 3Com, Cisco Systems, Ericsson, Lucent Technologies, MCI, Nortel, Siemens, Texas Instruments, and many others).

Comments confirm, protecting these services from Section 251(c) would not be a "win-win situation," as APT claims (*see* APT at 2 n.1), but would in fact thwart competition for three reasons. First, the ILECs still have monopoly control over the loops and other network elements that will be used in the provision of these services, and they have denied CLECs access to loops that are conditioned to provide high capacity data services.¹⁰ Second, even if ILECs were providing nondiscriminatory access to loops conditioned to provide xDSL services, not all CLECs will initially have enough customers to justify either a full facilities buildout or "the upfront investment in both the xDSL-related equipment and the collocation space," and therefore the availability of resold xDSL services and unbundled elements at cost-based rates will be "essential" if there is to be widespread competition.¹¹ Third, it is likely that the ILECs will soon be able to integrate xDSL modems into their switches, which will give them insuperable advantages over CLECs that must make do with separate equipment in collocated spaces. Therefore, unbundled access to those features and functionalities of the switch will be necessary to permit CLECs to share in the ILECs' economies of scale and scope, as Congress intended. Failure to provide such access would certainly "impair the ability of the CLECs to provide the services that [they] seek to offer" (§ 252(d)(2)).

For all of these reasons, even if it were legally permissible, APT's proposal would be bad policy. It would give the ILECs an unmatchable ability to offer all services (voice

¹⁰ *See, e.g.,* AT&T at 12; ALTS at 6-7.

¹¹ MCI at 9; *see id.* ("[n]ew entrants must have the opportunity to deploy their own xDSL-conditioned loops and xDSL-related equipment (modems, etc.), to deploy their own xDSL-related equipment but lease the xDSL-conditioned loops from the BOCs, to lease both the equipment and the loops, or to resell the entire end-to-end xDSL services provided by the BOCs").

and data) over the same deregulated "pipe," free from any competitive threat.¹² Under those circumstances, consumers would suffer, because the ILECs would be free to roll out these new technologies according to their own timetables, as happened with ISDN. *See* MCI at 4-5 ("[r]egulatory forbearance is only appropriate in competitive markets," and it is "clear that the local market is not open to competition").

Finally, BellSouth's further argument that Section 251 is "silent" on the question whether facilities deployed after passage of the Act must be unbundled is frivolous. BellSouth at 5. Sections 251(c)(3) and (c)(4) by their terms impose continuing duties applicable to the network elements and services as they exist at the time the duty to provide them is invoked, and, indeed, the Commission has already rejected BellSouth's argument. *See Local Competition Order*, ¶ 246. BellSouth's suggestion that the statute is "silent" on the matter is tantamount to suggesting that the nondiscrimination requirement of Section 202(a) applies only to the services and facilities offered in 1934. AT&T at 10-11; AT&T Bell Atlantic Comments at 10-11; MCI at 9; CIX at 6-7; TRA at 9-10; TCG at 4.

2. The Comments also show that the Commission should not address the potential sunset of the Section 251(c) UNE/TELRIC regime. As the commenters recognize, Section 10 itself provides the standards for when forbearance from Section 251 would be appropriate. *See* MCI at 13. At this early stage in the implementation of Section 251, it would be impossible and counterproductive for the Commission to make formal statements speculating about when Section 10's standards may be met. The Commission should focus its energies on implementing Section 251 -- not on the far-off possibility that someday conditions may justify forbearance. *See* MCI at 13-14 (establishing firm sunset

¹² As the Commenters show, APT's other assumption -- that the ILECs face stiff competition from cable companies in the provision of broadband services -- is also wrong. *See* MCI at 10; *see also* AT&T Bell Atlantic Comments at 31-32.

dates will provide perverse incentives for the BOCs to frustrate implementation of Section 251 in the interim).¹³

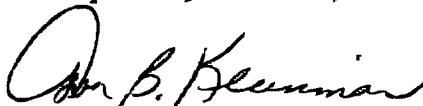
3. Finally, virtually all of the commenters agree that APT's proposal for a Commission-directed federal-state program to encourage community demand aggregation would be inappropriate. *See, e.g.,* Sprint at 7-8. As Intermedia points out (at 9-10, 17), Congress has already addressed APT's concerns in Section 254, which authorizes the Commission to establish mechanisms to preserve and advance universal service. The Commission has already taken many steps to implement Section 254, including a \$2.25 billion per year program for financing discounted advanced telecommunications services to every school, library, and rural health care provider in the nation. In light of the existence of these expansive programs, in addition to the Commission's efforts to promote local competition generally through the implementation of Section 251, there is no cause for the Commission to launch another industry-funded program that would largely duplicate these efforts.

¹³ The Commission may want to explore the possibility, suggested by LCI, that allowing the ILECs to create a separate company for the provision of advanced services would permit broader regulatory relief for that separate company. However, for such a company to be truly separated from the ILEC's existing operation -- *i.e.*, for the company to be on a truly equal footing with the CLECs -- it must achieve separation much more meaningful than what has been proposed either by APT (Petition at 17) or by LCI. It must be a totally divested entity that is not commonly owned with the ILEC; it must purchase access to the UNEs and resale on the same terms as any other CLEC; it must be prohibited from obtaining collocation not offered to other CLECs; and it must obtain access and resale at the same prices as CLECs. Only upon such divestiture could the Commission relieve the ILECs' broadband operations from the duties of Section 251(c).

CONCLUSION

For the foregoing reasons and those stated in AT&T's Comments, APT's specific proposals should be rejected, and the Commission should conduct a broad Section 706 inquiry that is not limited to the one-sided issues raised in APT's Petition.

Respectfully submitted,

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May 4, 1998

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Keep America Connected
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MCI Telecommunications Corporation ("MCI")
National Association of the Deaf ("NAD")
National Association of Regulatory Utility Commissioners ("NARUC")
SBC Communications Inc. ("SBC")
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CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 4th day of May, 1998, a copy of the foregoing "Reply Comments of AT&T Corp." was served by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.


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